CORRECTED COPY

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-728

STAR SHIPPING A/S,
the Motorship STAR CLIPPER and
BUCHANAN SHIPPING CO., INC.,
Petitioners,

v.

PACIFIC LUMBER & SHIPPING COMPANY, INC., et al.,
Respondents.

PETITION

FOR WRIT OF CERTIORARI

to the
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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to the
UNITED STATES COURT OF APPEALS
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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in Case No. 79-4225, entered on August 14, 1979.[1]

1. In addition to Pacific Lumber & Shipping Co., Inc., the respondents are Heidner International Corporation, R. W. Export, Ltd., Intercontinental Lumber Company, Boise Cascade Corporation, Publisher's Forest Products, Inc., The Windsor Company, Dant & Russell, Inc., Patrick Lumber Company, Columbia Harbor Lumber Company, Georgia-Pacific Corporation, Big Bay Timber, Ltd., North Pacific International, Inc., Zenith Lumber Company, Inc., Oregon Pacific Industries, Merrill Lynch Wood Markets, Inc., Tree Products Company, Inc., American & Tropical Forest Products Company, Inc., Fireman's Fund Insurance Company, Northwestern National Insurance Company, Royal Globe Insurance Company, Centennial Insurance Company, and Hartford Fire Insurance Company.

OPINIONS BELOW

The order of the district court is reported at 464 F. Supp. 1314. There was no opinion in the Court of Appeals for the Ninth Circuit; its order dismissing petitioners' appeal was not reported. Both orders are reprinted in Appendix A hereto.

JURISDICTION

On August 14, 1979, the court of appeals entered its order affirming the judgment of the district court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether compliance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards requires that an order denying a stay of an admiralty suit pending arbitration be appealable under 28 U.S.C. § 1291 or 28 U.S.C. § 1292(a)(1)?

STATUTES AND TREATY INVOLVED

The court of appeals jurisdictional statutes, 28 U.S.C. §§ 1291 and 1292(a)(1), appear in pertinent part at page five.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides, in pertinent part:

ARTICLE II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

The provisions of the Federal Arbitration Act, Title 9, United States Code, which implement and apply to the Convention, appear in Appendices B and C.

STATEMENT OF THE CASE

This is an action in admiralty by shippers and cargo insurance underwriters arising from loss of cargo overboard during a storm in the Mediterranean. This petition results from an order dismissing petitioners' appeal from the district court's order denying petitioners' motion for a stay pending arbitration.

Shipments of lumber were loaded on deck aboard the motorship STAR CLIPPER at Coos Bay, Oregon, in October 1978, and were lost overboard in November 1978 while the ship was proceeding toward Livorno, Italy, its first port of call. There were eighteen shippers, all of them in business in Oregon, Washington, or California, and some forty consignees at Livorno and Naples, Italy, and at Barcelona, Spain. The ship was owned by the claimant Buchanan Shipping Co., Inc., of London, England, and was operated by Star Shipping A/S of Bergen, Norway.

Some ninety bills of lading were issued by the carriers. All of them were endorsed on the face with the following typewritten words:

ALL DISPUTES ARISING UNDER THIS BILL OF LADING SHALL BE SETTLED IN ACCORDANCE WITH THE PROVISIONS OF THE ARBITRATION ACT OF 1950 IN LONDON. THE AWARD OF THE ARBITRATORS OR UMPIRE TO BE FINAL AND BINDING UPON BOTH PARTIES.

On February 8, 1979, the shippers and five insurance companies filed a complaint in federal district court in Seattle, against Star Shipping A/S and the motorship STAR CLIPPER. They alleged admiralty jurisdiction and said they were bringing this action on their behalf and on behalf of the consignees as well. They claimed a loss of $750,000.

On February 12, Buchanan Shipping Co., Inc. filed a claim as owner of the vessel and a motion to stay the action pending arbitration in London. On February 14, Star Shipping A/S joined in the motion and submitted a memorandum of authorities in support of the contention by both parties that they were entitled to a stay order under the terms of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards as implemented in Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201 *et seq*.

On February 15, the district court heard the motion and denied it. At that time, the district judge stated that he did not intend to make a written order. On the basis of that statement, petitioners filed a notice of appeal and designation of the record the following day.

On February 16, respondents prepared and lodged a proposed order stating reasons for denying the stay, which was ultimately signed by the district court and filed on February 26. This order is reprinted in Appendix A hereto.

On May 12, the respondents filed a motion in the Court of Appeals for the Ninth Circuit to dismiss the appeal, contending that the order denying the stay was non-appealable. On May 18, petitioners filed a response contending that the order was appealable, and at the same time filed an alternative motion for leave to file a petition for writ of mandamus. On August 14, 1979, the court of appeals entered its order, without opinion, in which it dismissed petitioners' appeal for lack of an appealable order, and declined to treat petitioners' appeal as a petition for a writ of mandamus. This order is also reprinted in Appendix A.

REASONS FOR GRANTING THE WRIT

I. The Holding of the Court of Appeals Raises an Important Question of Federal Procedure

Title 28 U.S.C. § 1291 provides, in pertinent part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court.

Title 28 U.S.C. § 1292(a)(1) provides, in pertinent part:

> (a) the courts of appeals shall have jurisidiction of appeals from:
>
> (1) interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, except where a direct review may be had in the Supreme Court; . . . .

The jurisdiction of the courts of appeals under this section is quite properly determinable by this Court. *Switzerland Cheese Assoc., Inc. v. Horne's Market Inc.*, 385 U.S. 23 (1966).

II. The Holding of the Court of Appeals Vitiates an International Convention to which the United States is a Party

Under 28 U.S.C. § 1292(a)(1) and its predecessor, an appeal will lie from an order granting or denying a stay

of an action at law pending determination of an equitable defense or counterclaim. *Enelow v. New York Life Insurance Co.*, 293 U.S. 379 (1935). Where the original claim was equitable, however, the order was held to be non-appealable. *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176 (1955).

The distinction is based on a two-part analysis. First, a stay is interpreted to be an injunction, appealable under 28 U.S.C. § 1292(a)(1), if the proceeding stayed is in another court.

Second, on the basis of the fictional distinction between the equity and law "sides" of federal district courts, a stay, although within one court and one proceeding, is said to be a stay by one court of another when the equity "side" stays the law "side." *Enelow v. New York Life Insurance Co., supra.* The stay of an action on the equity "side" pending determination of a legal or equitable defense or counterclaim, however, is merely a docket adjustment because just as a court of equity does not stay itself, the equity "side" does not stay itself. *Baltimore Contractors, Inc. v. Bodinger, supra.*

Following the *Enelow* reasoning, this Court specifically held appealable an order granting or denying a stay of an action at law pending arbitration. *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449 (1935). As in *Enelow*, the Court equated such an order to the grant or denial of an injunction.

When the order granting a stay pending arbitration was entered in admiralty, however, a different result was reached. *Schoenamsgruber v. Hamburg American Line*, 294 U.S. 454 (1935). In holding such an order to be non-

appealable, the Court noted that courts of admiralty do not have general equitable jurisdiction and, except in limitation of liability proceedings, do not issue injunctions. *Id.* at 457.

This result has been described as "anomalous . . . , based on historical distinctions rather than on policies relevant to the desirability of allowing interlocutory appeals," *Penoro v. Rederi A/B Disa*, 326 F.2d 125 (2d Cir.), *cert. denied sub nom. Rederi A/B Disa v. Cunard S.S. Co.*, 389 U.S. 852 (1967), and as an "incongruity" which "springs from the persistence of outmolded procedural differentiations," *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. at 184-85.

Mr. Justice Black, in addressing this same issue, wrote:

> An order should be appealable within the meaning of this statute if in substantial effect it is equivalent to an injunction, and as a matter of fact we have so held. *Ettelson v. Metropolitan Insurance Co.*, 317 U.S. 188, 87 L. Ed. 176, 63 S. Ct. 163 (1942). . . . I think the time has come to abandon this outmoded fiction about "sides of the court" and return to the sound principles announced in *Ettelson, supra.* Here as in *Ettelson* petitioner is "in no different position than if a state equity court had restrained [it] from proceeding in [a] law action."

Rederi A/B Disa v. Cunard S.S. Co., 389 U.S. 852, 853 (1967) (dissent to denial of certiorari). Mr. Justice Black concluded his dissent by declaring that he "would grant the writ, reverse the judgment below, and require a ruling now on *the only controversy . . . that is ripe for decision at this time—should the case be arbitrated or tried in court?*" *Id.* at 855 [emphasis added].

An order in admiralty denying a stay pending arbitration has also been held non-appealable under 28 U.S.C. § 1291, on the grounds that the order was not "final" within

the meaning of that section. *Schoenamsgruber v. Hamburg American Line, supra.* Petitioners submit, however, that an admiralty order granting or denying a stay pending arbitration forces upon the parties either a superfluous trial or a superfluous arbitration, all at a tremendous expenditure of time and money. Such an order should fall within "that small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

The unavailability of prompt review of an admiralty order denying a stay pending arbitration undercuts the utility of arbitration by frustrating its central purpose—expedience. Expedient resolution of disputes is of particular concern in international commerce. This concern is reflected in the fifty-nation Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the thrust of which is to recognize not only the desirability of arbitration as an expedient device for conflict resolution, but also the desirability of uniform access to arbitration among subscribing nations. Our national commitment to these principles is reflected in Congress' accession to the Convention in 1970.

The desirability of uniform treatment of commercial remedies in multi-national transactions has also been recognized by this Court. "A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying

by the parties to secure tactical litigation advantages." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974). Judicial actions which subvert carefully drawn international agreements regarding commercial remedies "surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." *Id.* at 517 [footnote omitted]. As Mr. Chief Justice Burger observed in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), "[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *Id.* at 9.

The question presented in the *Rederi* petition for certiorari should be reconsidered in light of these subsequent developments. This country's implementation of the Convention, and the anti-parochial stance taken in *Zapata* and *Scherk*, vindicate the analysis of Mr. Justice Black in *Rederi:* an admiralty order denying a stay pending arbitration should be promptly appealable, either under 28 U.S.C. § 1291 as a final order, or under 28 U.S.C. § 1292(a)(1) as an interlocutory order amounting to an injunction.

The Convention applies to the bills of lading at issue in this case because they evince international transactions, and because they are "bills of lading issued by a water carrier." 9 U.S.C. §§ 1, 2, 202. Congress has directed that

the Convention "shall be enforced in U.S. Courts." 9 U.S.C. § 201. The Convention, in Article II, provides:

> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

These provisions, together with the rest of the Convention, are manifestly intended to enhance and protect the utility of arbitration agreements in international commercial transactions. As this Court has observed:

> The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries. . . . In their discussion of [Article II], the delegates to the Convention voiced frequent concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements.

Scherk v. Alberto-Culver Co., 417 U.S. at 520, n. 15 [citations omitted].

Petitioners submit that for the Convention's purpose to be realized, denial of a stay pending arbitration must be open to prompt appeal and review. An arbitration agreement is worthless if arbitrability is determined only after years of litigation and appeal. As one long-time commentator on the Convention has observed, "The Convention is

directed to the competent authority, presumably the courts, of each contracting state and *leaves much of its effectiveness to the procedures of those courts* and to the particular agreement between the parties." Quigley, *Convention on Foreign Arbitral Awards*, 58 A.B.A.J. 821, 822 (1972) [emphasis added]. Without prompt review, implementation or frustration of Article II's requirements and attendant commercial expectations of uniformity is effectively left to the hundreds of federal district judges in all their unpredictable variety.

Finally, petitioners point out that the district court's denial of petitioners' motion was based on a provision of the United States Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300 *et seq.* COGSA is the 1936 codification of an international convention to which the United States later became a signatory. Chapter 2 of the Federal Arbitration Act is the 1970 implementation of another international convention to which the United States is a signatory. To the extent the Federal Arbitration Act conflicts with COGSA, the former must prevail because it is later in time. *Cook v. United States*, 288 U.S. 102 (1933); *Whitney v. Robertson*, 124 U.S. 190 (1888). Accordingly, no provision of COGSA should be construed to vitiate the unequivocal provisions of Chapter 2 of the Federal Arbitration Act.

If the United States is truly to shed itself of the parochialism recognized as undesirable in *Zapata* and *Scherk*, and if the United States is to abide by the international obligation which it undertook in acceding to the arbitration convention, admiralty orders denying stay pending arbitration should be promptly appealable.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: November 5, 1979.

Respectfully submitted,

THOMAS J. MCKEY
of Bogle & Gates
Counsel for Petitioners

David R. Millen
Jeffrey R. Masi
On the Petition

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC LUMBER & SHIPPING COMPANY, INC., HEIDNER INTERNATIONAL CORP., R. W. EXPORT LTD., INTERCONTINENTAL CORPORATION, *et al.* *Plaintiffs/Appellees,* v. STAR SHIPPING A/S, *Defendant/Appellant,* and M.S. STAR CLIPPER, *Defendant,* and BUCHANAN SHIPPING COMPANY, *Claimant/Appellant.*	No. 79-4225 D.C. #CV79-140 WTB Western Washington (Seattle) ORDER

Before: BROWNING and WALLACE, Circuit Judges.

Upon due consideration, the court issues the following order:

(1) the appeal is dismissed for lack of an appealable order;

(2) the court declines to treat the appeal as a petition for writ of mandamus; and

(3) appellee's motion for an extension of time in which to file its brief is denied as moot.

FILED
August 14, 1979
EMIL E. MELFI, JR.
Clerk, U.S. Court of Appeals
No. 79-4225

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PACIFIC LUMBER & SHIPPING CO., INC., *et al.*, *Plaintiffs*, v. STAR SHIPPING A/S and the M. S. STAR CLIPPER, *Defendants*, BUCHANAN SHIPPING CO., *Claimant*.	In Admiralty In Rem and in Personam No. C79-140 ORDER

FILED IN THE
UNITED STATES DISTRICT COURT
Western District of Washington
FEBRUARY 26, 1979
JOE R. ROMAINE, *Clerk*
By .....*Deputy*

The motions of defendant Star Shipping A/S and the claimant of the M.S. STAR CLIPPER to shorten time for hearing of motion to quash notice of deposition, to shorten

time for hearing of motion for stay of action pending arbitration, to quash notice of depositions and for protective order, and for stay of action pending arbitration, were heard by the Court on February 13 and 15, 1979. The Court has considered the arguments of counsel and the briefs and affidavits of Thomas McKey and Carol Nett dated February 14, 1979 and plaintiffs' brief and affidavits of David Danielson (including its exhibits) dated February 15, 1979 and the affidavit of Gerald Strand dated February 14, 1979. At issue is the effect of the following clause which is on the face of all of the applicable bills of lading:

> ALL DISPUTES ARISING UNDER THIS BILL OF LADING SHALL BE SETTLED IN ACCORDANCE WITH THE PROVISIONS OF THE ARBITRATION ACT OF 1950 IN LONDON. THE AWARD OF THE ARBITRATORS OR UMPIRE TO BE FINAL AND BINDING UPON BOTH PARTIES.

The affidavit of Carol Nett establishes that the so-called "London arbitration clause" was inserted in defendant Star Shipping A/S's Mediterranean bills of lading at Star's direction. The affidavits of Nett, Gerald Strand and David Danielson indicate that the "London arbitration clause" was not negotiated or discussed with the shippers of cargo transported on vessels owned or chartered by Star. From the materials presented to the Court, there is no indication that the shippers ever had an option to have that clause deleted. Further, the affidavits of Strand and Danielson illustrate that the bills of lading which were identified in those affidavits were not received by the shippers in their completed form until after the STAR CLIPPER sailed from Coos Bay.

These bills of lading are contracts of adhesion, and I find that the "London arbitration clause" was not freely negotiated between the parties. That clause is a foreign forum clause. This case is governed by the provisions of the Carriage of Goods by Sea Act (COGSA) 46 U.S. Code, §1300, et seq. and violates §1303(8) of COGSA. *Mitsui & Co., Ltd., et al. v. M/V GLORY RIVER, et al.*, No. C-78-259B, (W.D. Wn. Aug. 30, 1978); *Indussa Corporation v. S.S. RANBORG*, 377 F.2d 200 (2d Cir. 1967); *Northern*

Assurance Co. Ltd. v. M/V CASPAN CAREER, 1977 A.M.C. 421 (N.D. Cal. 1977). If ocean carriers were allowed to unilaterally select the forum for the resolution of cargo claims it would be an invitation to carriers to select forums having no relationship to the ports of loading or discharge and the carriers would be at liberty to select forums that might not fairly enforce COGSA.

Accordingly, the Court rules as follows:

1. The motions of Star Shipping A/S and the claimant to shorten time for hearing of motion to quash notice of deposition and to shorten time for hearing of motion to stay of action pending arbitration are granted.

2. The motions of Star Shipping A/S and the claimant for stay of action pending arbitration and to quash notice of depositions and for protective order are denied.

DATED this 23rd day of February, 1979.

[signature] W. T. BEEKS
UNITED STATES DISTRICT JUDGE

Presented by:
LANE, POWELL, MOSS & MILLER

[signature]

David Danielson, Of
Attorneys for Plaintiffs

APPENDIX B

FEDERAL ARBITRATION ACT, CHAPTER 1, 9 U.S.C. §§ 1, 2, 3, 8

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

July 30, 1947, c. 392, 61 Stat. 670.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

July 30, 1947, c. 392, 61 Stat. 670.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration

under an agreement in writing for such arbitrations, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

July 30, 1947, c. 392, 61 Stat. 670.

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

July 30, 1947, c. 392, 61 Stat. 672.

APPENDIX C
CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Reservation

"The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State."

"The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States."

[Note: Norway and England are signatories to the Convention.]

FEDERAL ARBITRATION ACT, CHAPTER 2, 9 U.S.C. §§ 201-203, 206-208

§ 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

Added Pub.L. 91-368, § 1, July 31, 1970, 84 Stat. 692.

§ 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

Added Pub.L. 91-368, § 1, July 31, 1970, 84 Stat. 692.

§ 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

Added Pub.L. 91-368, § 1, July 31, 1970, 84 Stat. 692.

§ 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

Added Pub.L. 91-368, § 1, July 31, 1970, 84 Stat. 693.

§ 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

Added Pub.L. 91-368, § 1, July 31, 1970, 84 Stat. 693.

§ 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

Added Pub.L. 91-368, § 1, July 31, 1970, 84 Stat. 693.

IN THE

Supreme Court of the United States

OCTOBER TERM 1979
NO. 79-728

STAR SHIPPING A/S, the Motorship STAR CLIPPER and BUCHANAN SHIPPING CO., INC.,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Petitioners misspeak themselves when they state that the court of appeals entered its order "affirming the judgment of the district court". Of course, the court of appeals did no such thing, but instead dismissed the appeal as being from a non-appealable order, see Appendix A to the Petition. Respondents, however, do not dispute the jurisdiction of this Court to consider the petition.

QUESTIONS PRESENTED

The question presented by the petition should be more accurately stated as, whether the adoption of the Convention On The Recognition And Enforcement Of Foreign Arbitral Awards as part of our domestic law in 1970, justifies or requires reversal of a rule of procedure settled for over forty years by decisions of this Court and courts of appeal? Or perhaps the question should be, does this petition present any recognized ground for granting a writ of certiorari?

REASONS FOR DENYING THE PETITION

I. The Petition's Attempt To Obtain Reversal Of A Settled Rule Of Procedure Does Not Qualify For The Granting Of Certiorari

From 1935 when this Court decided Schoenamsgruber v. Hamburg American Line, 294 U.S. 454 (1935) to the present date, this Court and courts of appeal in an unbroken line of decisions have held that an order granting or denying a stay of an admiralty suit pending arbitration is not appealable as a matter of federal procedural law. Twenty years after its decision in Schoenamsgruber, this

Court adhered to that position in Baltimore Contractors v. Bodinger, 348 U.S. 176 at 184 (1955). In 1967 this Court denied certiorari to consider the issue of appealability of such an order in Rederi A/B Disa v. Cunnard SS Co., 389 U.S. 852 (1967).

The courts of appeal in decisions both before and after the unification of admiralty and civil rules, and the adoption by Congress in 1970 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 et seq., have uniformly followed and applied Schoenamsgruber. In Penoro v. Rederi A/B Disa, 326 F.2d 125 (2d Cir. 1967) the Court of Appeals for the Second Circuit held that the unification of civil and admiralty rules did not affect prior decisions denying the appealability of an order in an admiralty case granting stay of an action pending arbitration pursuant to a charter agreement. And the court pithily answered petitioners' cries that such an order should be regarded as one of substance which is required to be appealable, by stating at 326 F.2d 131:

> Stays of the kind with which this case is concerned are merely calendar orders. They do no more than delay proceedings; in the great majority of cases they do not, in practical effect, determine substantial rights of the parties or cause irreparable harm. They demonstrate no crying need for an exception to the final judgment rule.

Despite Mr. Justice Black's opinion to the contrary, see 389 U.S. 852, 853 (1967) -- on which petitioners rely but with which only one other Justice of this Court agreed -- this Court denied certiorari.

Other cases from circuit courts of appeal holding that unification of admiralty and civil rules has not changed the rule denying appealability of such interlocutory orders in admiralty are O'Donnell v. Latham, 525 F.2d 650 (5th Cir. 1975), and J.M. Huber & Co. v. M/V Pym, 468 F.2d 166 (4th Cir. 1972). The latter case, like the case at bar, was an action in admiralty to recover damage to cargo wherein the defendant filed a motion to stay the proceeding pending arbitration pursuant to a charter party provision, which motion to stay was denied. The court of appeals held that the order denying the stay was not appealable,

following Schoenamsgruber v. Hamburg American Line, 294 U.S. 454 (1935).

If there were any doubt of the continuing vitality of the rule of non-appealability of the kind of order involved in this case, it has been laid to rest by the recent decision of the Court of Appeals for the Second Circuit in Tradax Ltd. v. M/V Holendrecht, 550 F.2d 1337 (2d Cir. 1977). That case involved an appeal from an order granting the shipowner's motion to stay a cargo damage suit pending arbitration. After exhaustively reviewing all possible legal grounds upon which an appellant might base an appeal from an order granting or denying a stay pending arbitration in an admiralty proceeding, the Second Circuit held that such orders were under no circumstances appealable. The court concluded at 550 F.2d 1341:

> We are thus required to confine appealability in maritime matters only to stays in an action at law or to final orders in independent actions.
>
> We have reviewed the situation once again to indicate that there has been no fundamental change in the past decade. We reiterate, in the hope of discouraging wasteful appeals, upon which we can impose sanctions if we think them to be filed for

purposes of delay, that orders such as this one are simply not appealable.

(Emphasis supplied.) Just last year the Court of Appeals for the Fifth Circuit, on the same grounds granted a motion to dismiss an appeal from an order denying a stay pending arbitration in a proceeding in admiralty, W.R. Grace & Co. v. Crustamar, 571 F.2d 318 (5th Cir. 1978).

We submit: The instant petition in no way qualifies for the granting of certiorari. The order of the court below was entered, not in conflict with but in conformity to, the uniform decisions of this Court and lower federal courts governing this rule of procedure for more than forty years. This Court's Rule 19 states the considerations governing review on certiorari; in no way does this case qualify.

II. The Adoption Of The Convention On The Recognition And Enforcement Of Foreign Arbitral Awards Provides No Ground For Reversing The Settled Rule Of Non-Appealability

The only possible question for consideration with respect to this petition is whether the

enactment of the Convention as domestic law, should compel the reversal of forty years of precedent holding non-appealable, orders granting or denying a stay of admiralty proceedings pending arbitration. Certainly, there is nothing in the language of either the Convention itself, (see following 9 U.S.C.A. § 201), or our statutes requiring enforcement of the Convention, 9 U.S.C. § 201-208, which in any way pertain to the issue of the appealability of such an order as was entered by the district court in the case at bar. In fact, the Convention manifests an intent that the rules of procedure of each contracting state be followed--not over-ridden. See Article III, stating, "Each Contracting State shall . . . enforce [arbitral awards] in accordance with the rules of procedure of the territory where the award is relied upon, . . ."

As previously indicated there have been a number of cases decided by the courts of appeal since the enactment by Congress of the Convention in 1970, which have reaffirmed the vitality of

Schoenamsgruber v. Hamburg American Line, 294 U.S. 454 (1935), with no indication that the adoption of the Convention has affected this well-settled rule of procedure that orders granting or denying a stay of an admiralty proceeding pending arbitration are not appealable. See, e.g., Tradax Ltd. v. M/V Holendrecht, 550 F.2d 1337 (2d Cir. 1977).

The principle reason why the adoption of the Convention is irrelevant to the issue of appealability of the order of the district court, is that foreign arbitration provisions in maritime contracts were specifically enforceable under the Arbitration Act of 1925, 9 U.S.C. § 1-8. Consequently the adoption by Congress of the Convention did not add new law and accordingly provides no basis for reversing the rule of procedure obtaining before the adoption of the Convention, that orders such as involved here are not appealable. This follows from this Court's decision in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974). In that case this Court had granted certiorari to consider

whether an arbitration agreement in an international sales contract was specifically enforceable. The lower court had held that it was not enforceable and had granted an injunction against the seller, enjoining him from proceeding with arbitration pursuant to a provision of their sales contract requiring arbitration before the International Chamber of Commerce in Paris. This Court, reversing, held that a foreign arbitration clause in an international sales contract was specifically enforceable, but the court reached this result under the original act, the Arbitration Act of 1925, 9 U.S.C. § 1 et seq. The case arose after the adoption of the Convention in 1970, yet the court found the 1925 Act to be applicable as requiring arbitration, finding that the sales contract there involved constituted "Commerce . . . with foreign nations" pursuant to § 1 of the Federal Arbitration Act, 9 U.S.C. § 1, and hence the arbitration agreement of the sales contract was "valid, irrevocable and enforceable" under the express provisions of the original Arbitration Act, see fn. 5, 417 U.S. at 511.

Aside from their lament that orders denying a stay of admiralty proceedings pending arbitration ought to be appealable, the entire thrust of the petition is that the adoption of the Convention has somehow rendered necessary a change in the law of appealability of such orders. But is is crystal clear from Scherk, supra, that the adoption of the Convention did not change the law because foreign arbitration agreements such as those contained in the bills of lading in the instant case, were just as enforceable -- if valid and they otherwise qualified -- under our pre-existing Federal Arbitration Act of 1925 as they have been subsequent to the adoption of the Convention. It follows, then, that the Convention furnishes no ground to reverse the settled rule of procedure relating to what orders are appealable and what are not under applicable procedural rules.

III. The District Court's Order Did Not Violate But Instead Applied The Terms Of The Convention

There have, in fact, been no "subsequent developments" since the petition for certiorari

was denied by this court in 1967 in Rederi A/B Disa v. Cunnard SS Co., 389 U.S. 852, see Petition for Certiorari, P. 9, which have anything to do with the procedural issue of whether an order granting or denying a stay of an admiralty proceeding pending arbitration is appealable.

Petitioner complains that the district court's order was an exercise of parochialism, displayed an unwarranted hostility toward the enforcement of arbitration provisions as the court was obliged to do pursuant to the provisons of the Federal Arbitration Act, and that somehow unless such orders are immediately appealable there will be a frustration of requirements of Article II of the Convention if left to the hands of hundreds of federal district judges "in all their unpredictable variety", Petition P. 11. Judge Beeks in this case did not ignore but instead applied the provisions of the Convention, and found the Convention not applicable in the following two respects:

1. Article II of the Convention requires enforcement of an "agreement in writing" containing

an arbitration clause, and defining "agreement in writing" to include a contract or an arbitration agreement "signed by the parties or contained in an exchange of letters or telegrams". The necessity that there be a freely negotiated voluntary agreement for arbitration in order that such purported agreements shall be specifically enforceable, was underscored by this Court's decision in M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), which enforced a foreign forum clause because it was found to be contained in a freely negotiated agreement. The Court stated at 407 U.S. 12:

> The choice of [a foreign] forum was made in arms-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts.

Compare that to the present case, where the record shows that as Judge Beeks found, not only was the arbitration clause of the bills of lading not "freely negotiated" between the parties, but it was not negotiated at all, since the respondent shippers did not even receive the bills of lading until after the ship had left the port of shipment!

In short, there was here no "agreement in writing" providing for arbitration which the district court was required to enforce pursuant to the mandate of the Convention.

2. Article II of the Convention further provides that the court of a contracting state shall refer the parties to arbitration "unless it finds that the said agreement is null and void, . . ." That is just what the district court did because it found the arbitration clause in this contract of common carriage to violate the provisions of the Carriage of Goods by Sea Act, 46 U.S.C. § 1303(8) as constituting an agreement tending to lessen the liability of the carrier by making more difficult the right of American shippers of cargo to obtain satisfaction from the carrier of their claims for cargo loss and damage. Section 1303(8) of COGSA specifically provides that such agreements in a contract of carriage "shall be null and void and of no effect".

Not only does paragraph 3 of Article II of the Convention specifically provide that the court of

a contracting state should not refer the parties to arbitration if it finds that the agreement is null and void, but Article V provides that recognition and enforcement of an arbitral award may be refused if the arbitration "agreement is not valid under the law to which the parties have subjected it . . ." Thus the district court in the case at bar did not ignore but instead applied the Convention in accordance with its terms. Whether the district court was right or wrong in finding the arbitration agreement null and void is a matter that can be tested on appeal when a final order is entered in this case which is appealable in accordance with the well-settled rules of appellate procedure. It is clear, however, that the district court's order has not "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision", S. Ct. Rule 19.

CONCLUSION

Petitioners make out no case, prima facie or otherwise, for issuance of a writ of certiorari and the petition should be denied.

DATED: November 27, 1979.

Respectfully submitted,

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